

# Cooley

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On April 13, 2011, the Obama administration released a draft Executive Order called "Disclosure of Political Spending by Government Contractors" ("Draft Order") that contemplates requiring federal contractors to disclose political contributions when bidding on federal contracts. As currently drafted, the disclosure obligation would require contractors to disclose contributions of the company and its subsidiaries, affiliates, officers and directors. The Draft Order is intended to "increase transparency and accountability" in the contracting system so that the American public is "ensure[d] efficient and economical procurement process[es]."

The disclosures required by the Draft Order are loosely modeled after those found in state "pay-to-play" laws, but, unlike the state laws, the Draft Order does not limit or ban political contributions by contractors. Despite its more limited focus, the Draft Order has generated significant criticism from Congress and the contracting community for its potential to politicize the contracting process, chill political contributions, and create a myriad of burdensome recordkeeping and reporting requirements for contractors.

## Disclosure requirements

The Draft Order, if implemented, would require contractors bidding on federal contracts to disclose all contributions or expenditures to or on behalf of (1) federal candidates; (2) parties or party committees; or (3) "third party entities with the intention or reasonable expectation that [such] parties would use those contributions to make independent expenditures or electioneering communications." The disclosure requirements would not only apply to the bidding entity, but also would require contractors to disclose political contributions made by their subsidiaries, affiliates, directors and officers.

The Draft Order would require contractors to disclose political contributions or expenditures that exceed \$5,000 in the aggregate to a single recipient in a year. The disclosure requirement would apply to all qualifying political contributions that occurred during the two-year period immediately preceding the date the contractor submits its bid. Once the data is submitted, the information will be made publicly available in a readable and downloadable format on [www.data.gov](http://www.data.gov).

If signed by President Obama, the Draft Order would become effective immediately and would apply to all contracts resulting from solicitations issued on or after the effective date of the action taken by the Federal Acquisition Regulatory Council to adopt the appropriate rules to implement the Draft Order.

## Political backlash

Since its release, the Draft Order has drawn significant criticism from certain members of Congress and the contractor community based on the belief that the disclosure requirements may be used inappropriately to award federal contracts based on political affiliation and would be overly burdensome for contractors. In fact, both houses of Congress responded to the Draft Order by proposing bills that would bar federal agencies from requiring contractors to disclose political contributions and prohibit contracting officials from considering information concerning contractors' political contributions (regardless of how the agency obtained the information).

Even if these bills are not passed, the Draft Order may be challenged on constitutional grounds. Thus, some commentators have speculated that the Draft Order infringes on the First Amendment rights recognized in the Supreme Court's landmark decision last

year in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which permitted corporations to make unlimited expenditures to third party groups in order to fund political advertisements.

## Conclusion

Given the breadth of these disclosure requirements, the Draft Order could undoubtedly cause various compliance issues for contractors if it is executed by the President. If you would like to discuss the potential impact of the Draft Order or have questions about this *Alert*, please contact one of the attorneys listed above.

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